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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LEONARD JESSE SANTOS, Defendant and Appellant.	D058124 (Super. Ct. No. SCS228057)

APPEAL from a judgment of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed.

A jury convicted Leonard Jesse Santos of attempted murder (Pen. Code,[1] § 664, 187, subd. (a); count 1), and two counts of assault with a deadly weapon other than a firearm (§245, subd. (a)(1); counts 2 & 3). The jury found true that Santos had committed each count for the benefit of, at the direction of, or in association with a

1 Statutory references are to Penal Code unless otherwise specified.

criminal street gang within the meaning of section 186.22, subdivision (b)(1). As to count 2, the jury found Santos had personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)).

At a subsequent proceeding, the court found Santos had suffered two prior convictions within the meaning of sections 667, subdivision (b) through (i) and 1170.12, subdivisions (a) through (d), and one prior conviction within the meaning of section 667, subdivision (a)(1).

After striking one of Santos's prior strike convictions, the court sentenced Santos to prison for 30 years. In sentencing Santos, however, the court stayed his sentence under section 654 for counts 2 and 3.

Santos appeals and raises multiple issues. He contends: (1) substantial evidence does not demonstrate he was connected with the stabbing of the victim or that the perpetrator who stabbed the victim was a gang member; (2) sufficient evidence does not show the attempted murder was a natural and probable consequence of the fistfight between Santos and the victim that arose out of their verbal exchange; (3) there is no substantial evidence of his intent to kill the victim; (4) substantial evidence does not support the true finding that Santos inflicted great bodily injury under count 2; (5) the court erred by failing to sua sponte instruct the jury on the lesser included offense of attempted voluntary manslaughter; (6) the court erred by failing to sua sponte instruct the jury on reasonable self-defense; and (7) Santos could not be convicted of two counts of assault because the record shows there was only one assault. We affirm.

FACTS

Prosecution

About 9:00 p.m. on March 21, 2009, Roy Flores was at a party in the backyard of a house on East Fourth Avenue in National City. Flores knew many people there, including his sister Jennifer, his friends Erick Perdraza and Alejandro Santos, and his cousins, Gabriel and Anthony Orendain. Around midnight, rumors began to circulate that the police were coming to break up the party, and Flores decided to leave. He then recognized Santos from high school. At that time, Santos was standing with a couple other males. When Flores asked Santos if he remembered who he was, Santos responded, "No fool. I am Kukuy[2] from OTNC." Flores took offense to Santos's response and thought Santos was trying to start a fight. A man who was near Santos asked Flores where he was from and quizzed him about the "C" on Flores's hat. Flores replied that he was not from anywhere, and the "C" stood for Compton, which was where he was raised. Flores became angry because he believed the men were "banging" on him (issuing a gang challenge), and he told Santos, "Get out of my face." A woman near Santos said, "No Kukuy, don't fight." Flores heard another man who was near Santos say, "Why don't you fight me then?" Anthony was able to separate Flores from Santos, and he and Gabriel convinced Flores to leave.

Soon thereafter, all the people at the party, 80 to 100 individuals, started leaving out of a side gate that emptied onto East Fourth Street. As Flores crossed the street with

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2 "Kukuy" means "boogeyman" in Spanish.

Gabriel and Anthony, he saw Santos standing under a tree with two men. One of the men pointed at Flores, and either that man or the second man said to Santos, "Are you just going to let him go like that? You better go for him." Gabriel held Flores tight and moved Flores past their position to avoid another confrontation. As the men neared Flores's car, which was parked adjacent to the entrance of the alley that intersected with East Fourth Street, Santos took off his shirt or sweatshirt and ran toward Flores. Flores broke free from Gabriel and faced off with Santos. Although there was conflicting evidence regarding who threw the first punch, eventually Flores pretended he was going to kick Santos and then hit him twice with his fists, knocking him to the ground. Flores allowed Santos to get "almost completely up," and then hit Santos again, knocking him to the ground.

As Santos moved to stand up, two other men rushed Flores. Flores hit the one on his left, knocking him down, and turned and hit the one on his right when he felt a "heavy blow" as Santos hit him above his right eye with a rock. The force of the impact dazed Flores, and he had trouble seeing. As Flores stumbled back, he turned around and fell against a chain link fence that boarded the alleyway. Several more men then attacked Flores. After he sustained several body blows, Flores fell to the ground.

As the fight expanded, Flores's assailants, including Santos, continued kicking and hitting him while he was on the ground. By then, Jennifer, Gabriel, Anthony, Erick, and

Alejandro had all entered the melee.[3] Soon, someone yelled out that the police had arrived, and most of the people left the scene. Flores's assailants fled down the alley and disappeared.

Gabriel picked Flores off the ground, where he was found "laying in a pool of his own blood," and walked him toward the car. Once they got to the car, Gabriel saw that his own shirt was covered with Flores's blood, and the inside of the car became bloodstained after Gabriel put Flores in the car. Gabriel and Anthony drove Flores to the hospital. After they arrived, Flores realized that he also had been stabbed in his upper right back, his left shoulder, his left arm, his left hand, and his left wrist. Indeed, Flores's ligaments and tendons in his left hand had been torn, almost completely disabling his hand. While being transferred to a different hospital, Flores lost consciousness.

After viewing a photographic lineup, Flores instantly recognized Santos. When Jennifer viewed the same photographic lineup, she also picked out Santos, but said, "If I had to guess, I would say that's him, but he had both of his eyebrows pierced." Gabriel, Anthony, and Erick all picked a photograph of Santos out of the same lineup.

Mark Segal, the prosecution's gang expert, is a 12-year veteran of the National City Police Department (NCPD). He currently works on assignment with the FBI's Violent Crimes Task Force Gang Group. He was previously assigned to the NCPD's gang enforcement team and received over 250 hours of formal training regarding gangs

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[3] Jennifer believed between three and six men attacked Flores. Alex thought six or seven men assailed Flores. Erick recalled six people beat Flores. Estimates of the total number of people fighting on behalf of Santos and Flores ranged from 10 to 20.

and gang members over the past five years. As a member of the gang enforcement team, he talked on a daily basis with gang members and worked with a variety of law enforcement and district attorney personnel regarding gangs and gang members.

Segal testified that "OTNC" stands for "Old Town National City," a documented criminal street gang with over 575 members. He noted its primary activities include robbery and assault with a deadly weapon. Segal further testified that Santos is a documented member or associate of the OTNC, his moniker is "Kukuy," and he used to have a pierced eyebrow.

Segal testified that the scene of the crime was within the territory claimed by OTNC, and gangs zealously protect their territory from rival gangs. Segal explained that when a gang member is "banging on" somebody, he is issuing a challenge. If someone stands up to a gang member under those circumstances, "it would be a complete in your face sign of disrespect" that could not go unanswered. If that gang member were to allow himself to be "disrespected" in front of other gang members, he would most likely be "checked" or beaten by them and then lose his membership in the gang. Segal further testified that a gang's power depends on the extent to which it is feared by rival gangs as well as the members of the community in which it operates. Any display of weakness by an individual member weakens the gang's standing as a whole.

After the prosecution asked Segal a hypothetical question based on the original verbal altercation between Santos and Flores, Segal opined that in those circumstances, a gang member would "almost have no other option" then to attack the person who had just stood up to him. If it appeared that the victim was getting the better of that gang member,

then his fellow gang members would step in because, "[t]hey don't want to be seen as punking out on a fight," and "[t]hey are expected to take care of their so-called brethren." Retaliation for such an act of disrespect could vary from a simple beating with fists to a homicide involving the use of weapons. Segal testified that gang members are frequently armed, and the more violently they respond to any perceived challenge, the more their status is enhanced within the gang.

Defense

The crux of Santos's defense at trial was that the witnesses identified the wrong person. To this end, Santos offered the testimony of Thomas MacSpeiden, a clinical psychologist, who discussed various factors relating to witness identification.

Santos did not testify in his own defense and the only other witness the defense offered other than MacSpeiden was Jennifer. Santos did not call any other witness from the party.

DISCUSSION

Although Santos raises numerous issues on appeal, his arguments can be grouped into four categories. First, he contends that substantial evidence does not support his convictions under counts 1 and 3 and the jury's finding that he caused great bodily injury in count 2. Second, he argues the court should have sua sponte instructed the jury on attempted voluntary manslaughter. Third, he insists the court should have sua sponte instructed the jury on reasonable self-defense. Finally, he claims he could not be convicted of two counts of assault because the record indicates that only one assault occurred. Because we determine none of Santos's claims has merit, we affirm.

I

SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGMENT

A. Santos's Contentions

Santos contends substantial evidence does not support the judgment. Specifically, he asserts substantial evidence does not show: (1) he was connected with the stabbing of Flores or that the perpetrator who stabbed the victim was a gang member; (2) the attempted murder was a natural and probable consequence of the fistfight between Santos and Flores that arose out of their verbal exchange; (3) his intent to kill Flores; and (4) Santos inflicted great bodily injury under count 2. We reject each contention.

B. Standard of Review

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility, and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We ask whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the allegations to be true beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

C. Counts 1 and 3

1. Substantial Evidence Connects Santos to the Perpetrator who Stabbed Flores and Supports the Inference That the Perpetrator was a Gang Member

At trial, the prosecution's theory was that the charged crimes were the product of gang violence. Santos was a member of OTNC, his friends at the party were members of OTNC, and they attacked Flores to protect and enhance the reputation of both Santos and OTNC. Santos's trial counsel did little to offer an alternative explanation of the altercation between Santos and Flores, but instead, focused Santos's defense on mistaken identity. Here, however, Santos challenges the sufficiency of the evidence that connects him to the perpetrator who stabbed Flores as well as the sufficiency of the evidence supporting the inference that same individual was a gang member.

Despite Santos's characterization of the fight between him and Flores as a "wholesale riot," the altercation, including the events leading up to it, contains the telltale signs of gang violence. In response to Flores's innocuous question to Santos if he remembered him from high school, Santos responded with his gang moniker and affiliation. An individual next to Santos then asked Flores where he was from and what the "C" on his hat stood for. Another individual asked Flores if he would fight him. Flores was upset by these comments and questions because he thought they were "banging" on him.

When the party was beginning to break up, Santos and two of his friends stood across the street pointing at Flores and one of the individuals next to Santos encouraged Santos to fight Flores: "Are you just going to let him go like that? You better go for

him." Santos, with friends in tow, then took off his sweatshirt or shirt and ran at Flores to attack him.

To buttress the testimony of the percipient witnesses, the prosecution offered the opinion of Segal, its gang expert. Segal's testimony was necessary to explain how a gang's reputation would be enhanced by this violence and why a gang member would choose to respond with violence or escalate the altercation with Flores. These are all matters "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a); see also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.)

As Segal explained, Santos's response to Flores's question evidenced Santos's pride in his gang and could be interpreted as a challenge to Flores. In addition, Segal testified that the question, "Where are you from," is a typical gang challenge asking the person questioned to identify what gang he is claiming. Thus, it was reasonable for a jury to conclude that Santos and his friend were issuing a "gang challenge" to Flores merely based on the initial interaction between Santos and Flores.

Also, Segal's testimony explained why Santos would escalate a verbal confrontation to an attempted murder. Santos had issued a gang challenge, and Flores did not back down. At that point, as Segal opined, both Santos's and OTNC's reputation could be diminished if Santos did not retaliate. Therefore, when the party was breaking up, Santos attacked Flores after Santos's friend encouraged him to do so. When Flores got the better of Santos in the fight, Santos's friends assailed Flores as well. Segal pointed out that such conduct is consistent with gang culture: "One fights, all fight."

This attack culminated with one of the individuals, who were beating Flores after Santos hit him in the head with a rock, stabbing Flores multiple times. Again, Segal explained the escalation was consistent with the gang mentality and that he would expect weapons to be used in the attack. In addition, the fight took place in OTNC territory.

Santos tries to discount the gang evidence by characterizing Flores as the aggressor. Such a conclusion is not supported by any facts. Flores simply asked Santos if he remembered him. We struggle to find how this innocent question could be interpreted as an act of aggression. Instead, it appears to be no more than a common question that one would ask at a party. It is true Flores became angry, but he did so only after he felt that Santos and his friends were issuing a gang challenge.

In summary, we conclude that substantial evidence supports the inference that the knife attack was gang related and Santos was connected to the perpetrator. Indeed, that is the only reasonable explanation provided to the jury at trial to describe why Santos and his friends attacked Flores after he only asked Santos if he remembered him.

2. Stabbing Flores With a Knife Was the Natural and Probable Consequence of Santos's Fistfight with Flores

Santos argues that substantial evidence does not support the conclusion that stabbing Flores with a knife was a foreseeable consequence of Santos's fistfight with Flores. We disagree.

It is undisputed that Santos participated in a fistfight that led to Flores being stabbed with a knife. However, the jury did not find that Santos personally used the knife. As such, it appears the jury convicted Santos of attempted murder and assault with

a deadly weapon (a knife) as an aider and abettor under the natural and probable consequences doctrine.

"A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133; italics omitted.) Liability under the natural and probable consequences doctrine "is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535 (*Nguyen*).)

"[A]lthough variations in phrasing are found in decisions addressing the doctrine -- 'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable' -- the ultimate factual question is one of foreseeability." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.) Thus, " '[a] natural and probable consequence is a foreseeable consequence'. . . ." (*Ibid.*) But "to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .' [Citation.]" (*Nguyen*, *supra*, 21 Cal.App.4th at p. 535.) A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case (*ibid.*) and is a factual issue to be resolved by the

jury. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 (*Olguin*); *People v. Godinez* (1992) 2 Cal.App.4th 492, 499.)

Here, Santos argues the natural and probable consequences theory is inapplicable because this case "does not have the traditional earmarks of a gang rivalry assault." Apparently, Santos believes that because Flores was not a gang member, the jury had to disregard any evidence that the attack of Flores was gang related, and thus, the natural and probable consequences doctrine is not applicable. However, Santos does not cite any authority for his position nor did our independent research produce any.

In addition, Santos's argument ignores the substantial evidence standard. He asserts "[t]he evidence showed the fistfight was a product of Flores's aggressive and hostile remarks directed at [Santos], accordingly it was clearly not planned and not reasonably foreseeable that an attempted murder would result from the escalation of this impromptu fistfight." Again, we are not concerned if the circumstances here might also be reasonably reconciled with a contrary finding. (*People v. Nelson, supra*, 51 Cal.4th at p. 210.) Further, we find little support for Santos's argument in the record.

"In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Santos essentially asks us to overlook this standard and accept his imprecise view of the record. We cannot do so, but instead we focus on the "whole record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261;

italics omitted.) Here, as we discuss above, the evidence shows that the attack on Flores was gang related. There is no evidence supporting Santos's argument that the fistfight was caused by Flores's aggressive and hostile remarks. To the contrary, Santos and his friends issued a gang challenge to Flores. As the party was ending and people were going home, Santos ran at Flores after his friend encouraged him to do so. On the record before us, we determine there is no other reasonable explanation for the fistfight occurring, but for Santos attacking Flores for the benefit of his gang. We strain to envisage any other reason why a friendly question, like do you remember me, could result in the questioner being beaten by several men and ultimately stabbed.

Discounting most of the evidence in the record, Santos, citing *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*), contends we need to apply six nonexhaustive factors to determine if the evidence is sufficient for conviction involving the natural and probable consequences doctrine in a gang case. These factors are whether: (1) the defendant had knowledge of the weapon that was used before his involvement in the crime; (2) the committed crime took place while the target crime was being perpetrated; (3) weapons were used shortly after the crime ensued; (4) the fight which led to the crime was planned; (5) the gangs were engaged in an ongoing rivalry; and (6) the defendant aided the commission of the committed crime. (*Id.* at p. 921.) Santos, however, misreads *Medina*. In *Medina*, our high court noted that the Court of Appeal had found the absence of these six factors to warrant reversal of two defendants' convictions as aiders and abettors. (*Ibid*.) However, the Supreme Court determined the Court of Appeal erred in focusing on facts that were missing, rather than the actual evidence presented. (*Ibid*.)

The court ultimately concluded "although evidence of the existence of the above listed factors may constitute sufficient evidence to support an aider and abettor's murder conviction under the natural and probable consequence theory, these factors are not necessary to support such a conviction." (*Ibid.*)

Following the lead of our Supreme Court, we do not evaluate the record in light of the six above listed factors, but nevertheless, after examining the whole record in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the stabbing of Flores was a reasonably foreseeable consequence of the gang assault in this case. In response to Flores asking Santos if he remembered him, Santos identified himself by his gang moniker "Kukuy" and claimed to be a member of OTNC. As the jury was told, this response could be a type of gang challenge. An individual near Santos then asked Flores where he was from, an alternative form of a gang challenge. Another person also near Santos asked Flores if he wanted to fight him. In addition, when everyone was leaving the party, Santos ran across the street to engage Flores after his companion encouraged him to do so.

Flores was able to handle Santos and even a couple of Santos's friends, until Santos hit Flores in the head with a rock. Then, up to six people, including Santos, began pummeling Flores as he leaned against the fence and eventually fell to the ground. During this time, he was stabbed.

Segal testified that gang members often carry weapons and will use them in a fight. Moreover, when presented with a hypothetical mirroring the facts of this case, Segal opined that he would expect a gang member to retaliate in response to Flores

standing up to Santos, which could result in an escalation of violence to include attempted murder.

Santos, however, insists the natural and probable consequences theory cannot apply because there is no evidence that he and his friends had a prior discussion or agreement to stab Flores. This argument lacks merit. (See *Medina, supra,* 46 Cal.4th at p. 924 ["[I]n the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed."]; see also *Olguin, supra,* 31 Cal.App.4th 1355, 1376 [escalation of gang-related confrontation from shouting to a fistfight to fatal shooting found "much closer to inevitable than it was to unforeseeable"].)

In summary, we conclude the record supports the jury's implicit finding that one of Santos's friends and fellow gang member stabbed Flores after Santos hit him in the head with a rock. Without the fistfight started by Santos, Flores would not have been stabbed. We are satisfied that substantial evidence supports that it was reasonably foreseeable that the fistfight would lead to the stabbing of Flores. (See, e.g., *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1452-1453 [the shooting of victim was a reasonably foreseeable consequence of a fistfight between rival gang members]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055 [shooting a natural and probable consequence of assault and breach of the peace]; *Olguin*, *supra*, 31 Cal.App.4th at p. 1376 [homicide a natural and probable consequence of punch thrown by gang member]; *People v. Godinez, supra,* 2 Cal.App.4th 492, 500 [homicide a natural and probable consequence of gang attack].) It is of no consequence to our analysis that Flores was not a rival gang member. The record

before us strongly supports the inference that Santos's assault of Flores was a gang-related attack.

3. Substantial Evidence Supports the Inference the Perpetrator Who Stabbed Flores Had the Intent to Kill Him

Santos next asserts the evidence was not sufficient to establish that the perpetrator who stabbed Flores intended to kill him. Without substantial evidence of this intent, Santos argues he cannot be guilty of attempted murder as an aider and abettor. (See § 31; *People v. Perez* (2005) 35 Cal.4th 1219, 1225-1226.) We are not persuaded.

A conviction for attempted murder "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The mental state required for attempted murder is express malice. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.' " (*Ibid.*, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1114.) "Malice is express when the killer harbors a deliberate intent to unlawfully take away a human life." (*People v. Lasko* (2000) 23 Cal.4th 101, 104; italics omitted.) "Express malice requires a showing that the assailant ' " 'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]" ' [Citation.]" (*Smith, supra*, at p. 739.) "Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420 (*Pre*).) For example, a defendant's use of a lethal weapon is often probative of intent to kill. (*Smith, supra*, at p. 741.)

Here, Santos claims that Flores's knife wounds underscore that the perpetrator did not intend to kill Flores. He notes the wounds were "on or very near Flores'[s] extremities and not in close proximity to a vital organ." Santos also emphasizes Flores was stabbed when he was prone and unable to defend himself, essentially asserting had the perpetrator intended to kill Flores, he would have done so. We disagree.

Our review of the record discloses sufficient evidence from which the jury could reasonably conclude the perpetrator intended to kill Flores. The perpetrator attacked Flores at close range with a knife. Flores was stabbed at least five times: in his upper right back, left shoulder, left arm, left hand, and left wrist. There is nothing in this record that leads us to believe these wounds were superficial. In fact, the evidence shows Flores was found lying in a pool of his own blood after being stabbed. Moreover, during her closing argument, Santos's trial counsel conceded that "Flores was severely injured" and "was stabbed severely."

We reject Santos's contention that the absence of a wound in a vital area of Flores's body, such as the heart, neck, or abdominal area, demonstrates a lack of intent to kill. Instead, we are satisfied on the record before us that a trier of fact could have reasonably inferred Flores was trying to protect himself with his hands and arms and the perpetrator was not able to deliver the fatal blow because of the number of other assailants attacking Flores at the time he was stabbed. Simply put, substantial evidence supports the jury's finding that the perpetrator intended to kill Flores. (Cf. *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 ["the totality of the circumstances, including the manner of the attack and the number and location of the penetrating knife

wounds [12 to 14 stabbings on the victim's left side, front, and back], was sufficient to support a finding of intent to kill"].)

D. Substantial Evidence Supports the Jury's True Finding of Great Bodily Injury Under Count 2

Santos claims the jury's true finding that he committed great bodily injury under count 2 (assault with a deadly weapon, a rock) was not supported by substantial evidence. Santos contends Flores's only injuries attributable to count 2 consisted of swelling around the eye and redness on the top of the head. Santos concludes this level of injury does not meet the definition of a "significant or substantial injury" as required under section 12022.7 and reversal of the jury's true finding is required. We disagree.

"Proof that a victim's bodily injury is 'great' -- that is, significant or substantial within the meaning of section 12022.7 -- is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (*People v. Cross* (2008) 45 Cal.4th 58, 66.) Although dealing with a torture offense (§ 206), this court observed that " '[s]ection 206 only requires "great bodily injury as defined in Section 12022.7" . . . . "Abrasions, lacerations and bruising can constitute great bodily injury." ' " (*Pre*, *supra*, 117 Cal.App.4th at p. 420, quoting *People v. Hale* (1999) 75 Cal.App.4th 94, 108.) "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836 [affirming finding of great bodily injury where child victim suffered multiple bruises from being beaten with a wooden stick, the injuries caused swelling and left severe discoloration on parts of her

body, and those injuries were still visible a day later].) The determination of whether a victim has suffered great bodily injury "is not a question of law for the court but a factual inquiry to be resolved by the jury." (*Cross, supra*, at p. 64.)

Santos contends that no reported case "has ever found the type of injury suffered by Flores adequate to constitute [great bodily injury]." He then provides a list of cases wherein the courts affirmed findings of great bodily injury and attempts to distinguish the instant matter from those cases. In doing so, however, Santos focuses on what evidence was not presented at trial instead of analyzing the evidence in the record.

Here, Flores testified that after he was hit by a rock he could no longer see and the blow "dazed [him] a lot." The force of the blow spun Flores around and caused him to stumble into a fence lining the alleyway. At the point of impact, Flores's face was swollen, and it left a lingering red mark. A CT scan of Flores's head was conducted. Flores also lost consciousness for a period of time. The jury saw photographs depicting injuries to Flores's face and head and were able to consider them in making its finding. Based on this evidence, we are satisfied that substantial evidence supports the jury's finding that Santos committed great bodily injury in count 2 when he hit Flores in the head with a rock.

Santos also asserts the jury was improperly instructed on the theory for great bodily injury. Although this argument is somewhat undeveloped in Santos's opening brief, apparently he contends the court erred in instructing the jury under CALCRIM No. 3160. We disagree.

The court instructed the jury under CALCRIM No. 3160 as follows:

> "If you find the defendant guilty of the crimes charged in count 1 attempted murder, and/or counts 2 and 3 assault with a deadly weapon, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant personally inflicted great bodily injury on Roy Flores during the commission or attempted commission of that crime. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] If you conclude that more than one person assaulted Roy Flores and you cannot decide which person caused which injury, you may conclude that the defendant inflicted great bodily injury on Roy Flores if the People have proved that: [¶] One, two or more people, acting at the same time, assaulted Roy Flores and inflicted great bodily injury on him; [¶] Two, the defendant personally used physical force on Roy Flores during the group assault; [¶] Or, three, the physical force that the defendant used on Roy Flores was sufficient in combination with the force used by the others to cause Roy Flores to suffer great bodily injury. [¶] The defendant must have applied substantial force to Roy Flores. If that force could not have caused or contributed to great bodily injury, then it was not substantial. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Santos argues this instruction was improper because there was no dispute about which weapon he wielded for count 2 and the injuries caused by his use of the weapon. (See *People v. Magnana* (1993) 17 Cal.App.4th 1371, 1381.) Further, he argues he was prejudiced by the instruction because it allowed the jury to consider Flores's stab wounds when it determined whether Santos personally inflicted great bodily injury in assaulting Flores with a rock. However, Santos concedes this theory was not presented to the jury because the prosecutor's closing argument focused on the injury that Flores received from the blow Santos delivered with a rock. In addition, CALCRIM No. 3160, by its own

terms, could not apply to the assault with a rock. There was no evidence presented that at least two people assaulted Flores at the same time he was hit with the rock. Instead, the evidence was that Santos hit Flores with the rock. As such, CALCRIM No. 3160 was not applicable under count 2, and we assume the jury understands and follows the instructions given. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions."].) Therefore, we conclude the court did not err in instructing the jury under CALCRIM No. 3160.

II

THE COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY ON ATTEMPTED VOLUNTARY MANSLAUGHTER

Santos argues the court committed prejudicial error when it failed, sua sponte, to instruct the jury on the lesser included offense of attempted voluntary manslaughter. We disagree.

The law governing a trial court's duty to instruct the jury on lesser included offenses, and the standard of review that this court applies in reviewing a trial court's decision regarding whether to give such an instruction, are well established:

> "Instructions on lesser included offenses must be given when there is substantial evidence for a jury to conclude the defendant is guilty of the lesser offense but not the charged offense. [Citations.] Substantial evidence is defined for this purpose as 'evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.] The trial court's decision whether or not the substantial evidence test was met is reviewed on appeal under an independent or de novo standard of

review. [Citations.]" (*People v. Garcia* (2008) 162 Cal.App.4th 18, 24-25.)

Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by, among other things, a sudden quarrel or heat of passion, or by an unreasonable but good faith belief in the necessity of self-defense. "Only these circumstances negate malice when a defendant intends to kill." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) To establish voluntary manslaughter under a heat of passion theory, as Santos attempts to do, both provocation and heat of passion must be found. (*Id*. at p. 60.) "First, the provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the decedent. [Citations.] Second, . . . the provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.)

When relying on heat of passion as a partial defense to the crime of attempted murder, both provocation and heat of passion must be demonstrated. (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) We agree with the People that evidence of provocation or heat of passion is not present here, and there is nothing in the record " 'substantial enough to merit consideration' by the jury of the lesser included offense of attempted voluntary manslaughter under a theory of sudden quarrel or heat of passion . . . ." (*Ibid*.) Not only was Santos's state of mind never argued by the defense at trial, but the evidence failed to demonstrate any indicia of provocation.

During closing argument, Santos's trial counsel argued Santos did not assault Flores. Santos's primary defense was a case of mistaken identity. Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense. (See *People v. Medina* (1978) 78 Cal.App.3d 1000, 1005-1006 [no duty to instruct on voluntary manslaughter based on diminished capacity when defendant testified he was not present when victim was shot].) Further, although Santos did not testify, there is little evidence in the record suggesting any objectively reasonable provocation. Santos and his friends issued a gang challenge, which angered Flores. As the party was ending, Santos ran across the street to engage Flores. There was conflicting evidence regarding whether Santos or Flores threw the first punch. Even if the jury found that Flores threw the first punch, the evidence remains that after being knocked to the ground a second time, Santos had the opportunity to walk away from his fight with Flores. However, Santos hit Flores in the head with a rock. Although Santos was knocked to the ground twice and possibly lost a tooth in the process, we do not conclude this injury would have been sufficient to cause "an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) Especially, here, where Santos initiated the fight by running at Flores and then escalated the level of violence by hitting Flores with a rock, which dazed Flores. Even with Flores subdued, Santos, along with several other men, attacked Flores, who was stabbed five times during the beating. Thus, there was no basis to instruct on the lesser included offense of attempted voluntary manslaughter based on a theory of heat of passion or sudden quarrel because the evidence

did not support giving the instruction. (Cf. *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 ["A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion."].)

III

THE COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY ON REASONABLE SELF-DEFENSE

Santos argues the court should have instructed the jury on reasonable self-defense because it was disputed whether Flores threw the first punch and the evidence demonstrated Flores spoke to Santos in an angry, hostile, and confrontational manner. We are not persuaded.

Santos does not argue that his trial counsel requested a self-defense instruction. In the absence of a request, a trial court has a duty to instruct with regard to a claimed defense only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) "[W]hen the trial court believes 'there is substantial evidence that would support a defense inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.' [Citation.]" (*Ibid.*, italics omitted.)

The doctrine of self-defense requires that the defendant must be in fear of imminent danger to life, or great bodily injury; fear of future harm will not suffice. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "[F]or either perfect or imperfect self-defense, the [defendant's] fear must be of imminent harm." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Third party threats, or even threats from the victim, do not alone establish self-defense. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1068.)

Santos did not testify at trial, and no evidence was presented that suggested Santos was in fear of imminent harm to himself or others when he assaulted Flores. To the contrary, Santos ran at Flores, which began the physical confrontation. We are satisfied that a reasonable jury would not infer Santos was in fear of imminent harm if he charged Flores.

Moreover, "any right of self defense is limited to the use of such force as is reasonable under the circumstances." (*People v. Pinholster* (1992) 1 Cal.4th 865, 966; see *People v. Clark* (1982) 130 Cal.App.3d 371, 380 ["[O]nly that force which is necessary to repel an attack may be used in self-defense; force which exceeds the necessity is not justified."].) Here, Flores's use of a deadly weapon was not justified under the circumstances. Santos and Flores engaged in a fistfight. Flores knocked Santos to the ground twice, but Santos had the opportunity to walk away. Instead, while Flores was preoccupied by other people attacking him, Santos hit Flores in the head with the rock, which stunned Flores.

In summary, there is nothing in the record that even hints at reasonable self-defense. No substantial evidence exists that Santos assaulted Flores in the actual and

reasonable belief it was necessary to avoid imminent harm to himself or others. As such, we conclude the trial court did not err in failing to give the jury a reasonable self-defense instruction.

IV

SANTOS WAS PROPERLY CONVICTED OF TWO SEPARATE ASSAULTS WITH A DEADLY WEAPON

Santos contends he could not be convicted of committing two separate assaults with a deadly weapon because there was only evidence of a single assault of Flores. We disagree.

Section 954 generally permits multiple convictions: "An accusatory pleading may charge . . . different statements of the same offense" and "the defendant may be convicted of any number of the offenses charged." The issue must be distinguished from the closely related question of whether a defendant may receive multiple punishments based on a single act or course of conduct. (*People v. Ortega* (1998) 19 Cal.4th 686, 692, disapproved on another point in *People v. Reed* (2006) 38 Cal.4th 1224, 1228.) Section 654 prohibits multiple punishments for the same act or omission. Our high court has recognized the tension between section 954 and section 654. The solution adopted, in general, is "to permit multiple convictions on counts that arise from a single act or course of conduct--but to avoid multiple punishment, by staying execution of sentence on all but one of those convictions." (*Ortega, supra,* 19 Cal.4th at p. 692.) In fact, that is what the trial court did in this case.

Here, Santos is not challenging his punishment, but instead, asserts his convictions for two counts of assault with a deadly weapon were improper because there was "never a break in the chain of events which could manifest an intent by [Santos] to commit a separate act of assault." He relies on the principle that "[a]bsent express legislative direction to the contrary, where the commission of a crime involves continuous conduct, which may range over a substantial length of time and [a] defendant conducts himself in such a fashion with but a single intent and objective, that defendant can be convicted of only a single offense." (*People v. Djekich* (1991) 229 Cal.App.3d 1213, 1221.) Citing *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1473-1475 (*Johnson*), the People respond that in the instant matter, each count of assault committed by Santos "reflected a separate, independent, and completed assaultive act, not a single continuous assault consisting of multiple blows." We agree with the People.

In *Johnson, supra*, 150 Cal.App.4th 1467, the court determined that multiple convictions for violating section 273.5 (corporal injury on a spouse) were proper where the convictions were based on multiple injuries inflicted during a single course of conduct. (*Johnson, supra,* at p. 1477.) There, the defendant beat the victim about the face and head, held her by the throat against the wall, and stabbed her in the arm. (*Ibid.*) The court agreed with the reasoning of *People v. Harrison* (1989) 48 Cal.3d 321, in which our Supreme Court rejected the contention that the defendant could not be convicted of multiple acts of digital penetration committed in the course of a 10-minute attack on the victim. (*Johnson, supra,* at pp. 1474-1475, citing *People v. Harrison, supra,* 48 Cal.3d at p. 327.)

Here, Santos first assaulted Flores by hitting him with a rock (count 2). At that point, the crime alleged in count 2 was complete. Santos then committed a second, separate offense alleged in count 3 when he joined the group beating Flores, during which one of his accomplices stabbed Flores with a knife. Each assault resulted in different injuries. Count 2 involved injuries to Flores's face and head while count 3 involved injuries to his arm, hand, wrist, shoulder, and back. We are satisfied that the assaults charged here in counts 2 and 3 and the injuries Flores sustained because of those assaults are analogous to the separate counts of corporal injury on a spouse in *Johnson*, *supra*, 150 Cal.App.4th 1467. Further, pursuant to section 654, the trial court properly stayed the punishment under counts 2 and 3. There was no error.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.